FILED
DEC 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5840

In The
Supreme Court of the United States
October Term, 1987

EDWARD McNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO,
DEPARTMENT OF ADOPTIONS,

Appellee.

On Appeal From the Court of Appeal of the State of California, Fourth Appellate District, Division One

MOTION OF APPELLEE TO DISMISS OR AFFIRM

LLOYD M. HARMON, JR., County Counsel
County of San Diego
DANIEL J. WALLACE, Chief Deputy
Counsel of Record
ARLENE PRATER, Deputy
1600 Pacific Highway, Rm. 355
San Diego, CA 92101-2469
Telephone: (619) 531-4847

Attorneys for Appellee

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	2
STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT	7
I. THE QUESTIONS PRESENTED AND SUPPORTING ARGUMENT OF APPELLANT IN HIS JURISDICTIONAL STATEMENT SUBSTANTIALLY MISSTATE THE HOLDINGS OF THE CALIFORNIA COURTS BELOW	7
II. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED IS NOT TIMELY OR PROPERLY RAISED AT THIS TIME	9
III. EVEN IF THE FEDERAL QUESTION HAS BEEN TIMELY AND PROPERLY PRESENTED BY APPELLANT, NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THIS CAUSE	12
IV. CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

Bellotti v. Baird, 443 U.S. 662 (1979) 16

Caban v. Mohammed, 441 U.S. 380 (1979) 13, 14

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 11

In re Baby Girl M., 37 Cal.3d 65 (1984) 2, 3, 5, 8, 10, 13, 15

Lehr v. Robertson, 463 U.S. 248 (1983) 13, 15, 16

Michael U. v. Jamie B., 39 Cal.3d 787 (1985) 10, 11

North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U.S. 156 (1973) 11

Parham v. Hughes, 441 U.S. 347 (1979) 14

Quilloin v. Walcott, 434 U.S. 246 (1978) 13, 14

Stanley v. Illinois, 405 U.S. 645 (1972) 13, 14

STATUTES—FEDERAL

28 United States Code section 1257 11

STATUTES—CALIFORNIA

Civil Code section 232, *et seq.* 3, 12

Civil Code section 4600 ..... 2, 3, 5, 6, 8

Civil Code section 7004 3

Civil Code section 7004, subdivision (a) 12

Civil Code section 7017 ..... 2, 3, 5

Civil Code section 7017, subdivision (b) 4

Civil Code section 7017, subdivision (d) 8, 9, 13

Civil Code section 7017, subdivision (d)(2) 3, 6

No. 87-5840

In The
Supreme Court of the United States
October Term, 1987

EDWARD McNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO,
DEPARTMENT OF ADOPTIONS,

Appellee.

On Appeal From the Court of Appeal
of the State of California,
Fourth Appellate District, Division One

MOTION OF APPELLEE TO DISMISS OR AFFIRM

To The Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Appellee, COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES (erroneously designated as "County of San Diego Department of Adoptions" by appellant) moves the court to dismiss the appeal herein or,

in the alternative, to affirm the judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division One on the grounds that it is manifest that the appeal does not present a substantial federal question, that any federal question sought to be reviewed was not timely and properly raised and that the judgment rests on an adequate non-federal basis.

OPINIONS BELOW

This appeal purports to be from the April 30, 1987 opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One (Appellant's Appendix[1] pp. 1a-41a). By order dated July 30, 1987, the California Supreme Court denied appellant's Petition for Review and ordered the opinion not to be published in the Official Appellate Reports. (App. p. 81a.)

In actuality, however, the appeal herein really is as to the October 1984 opinion of the California Supreme Court, *In re Baby Girl M.*, 37 Cal.3d 65 (1984) (App. pp. 42a-76a). This opinion held that the provisions of California Civil Code section 4600 as to the dual standard of best interests and detriment was applicable to California Civil Code section 7017 proceedings to terminate the rights of an alleged natural father. The court of appeal opinion from which this appeal purports to be taken rejected appellant's contention

[1]The references to the opinions below, statutes and other documents which appear in the Appendix to appellant's Jurisdictional Statement are hereinafter cited as "App. —".

that the legal standard of detriment had not been properly applied on the remanded trial.

STATUTORY PROVISION INVOLVED

California Civil Code section 7017 provides the provisions for terminating the parental rights of an alleged natural father (an unwed father who has never received the child into his home) when a mother relinquishes a child for adoption.[2] When the California Legislature enacted these provisions they did not specify the standards to be employed in a California Civil Code Section 7017, subdivision (d) proceeding (App. p. 84a). The California Supreme Court in ***In re Baby Girl M., supra,*** determined that under the then state statutory scheme California Civil Code section 4600 was applicable. California Civil Code section 4600 provides that before a court makes any order awarding custody to a non-parent, it shall make a finding that an award of custody to the parent would be detrimental and award of custody to a non-parent is required to serve the best interests of the child. Effective January 1, 1987, the California Legislature amended California Civil Code section 7017, subdivision (d)(2) as to the standards to be used in the proceedings and to specifically state that California Civil Code section 4600 does not apply to the

[2]As detailed in the Argument section III herein, a different statutory scheme (Cal. Civ. Code, § 232, *et seq.)* provides for the termination of the parental rights of mothers and presumed natural fathers (as defined by Cal. Civ. Code, § 7004; App. pp. 82a-83a) in California.

proceedings (App. pp. 15a-15a-2). The legislative amendments were not applied to the case herein.

STATEMENT OF THE CASE

On August 10, 1981, appellee County of San Diego Department of Social Services, a licensed adoption agency, filed an action pursuant to California Civil Code section 7017, subdivision (b) seeking to terminate the rights of appellant to Baby Girl M. (Miller) born July 18, 1981 so that the minor could be adopted. The minor had been relinguished for adoption by the mother on August 5, 1981. The mother and appellant had had a casual three month relationship from approximately September through November 1980; they had not married nor attempted to marry and appellant was unaware of the mother's pregnancy or the minor's birth until about August 1, 1981. Appellant initially stated he did not want custody of the minor himself but wanted the minor placed for adoption with a family of his own choosing, which alternative was rejected by the mother and never followed through by the family he had chosen. Appellant then indicated an interest in custody himself. At the time he was unmarried, had temporary custody of his two sons by a prior marriage and was proposing a full-time child care situation for the minor while he worked. On August 24, 1981 the minor was placed with a family whose profile the mother had approved and she has been with that family ever since. Other than a few short visits in 1981 there have been no visits or contacts between appellant and the child (since named Katie).

The first trial in this matter was in December 1981 and the court granted the petition finding that appellant was the alleged, but not the presumed, natural father of the minor and that it would not be in the best interests of the minor for appellant to be given custody. Appellant filed an appeal from that judgment contending that the trial court should have applied the California Civil Code section 4600 dual standard of best interests and detriment in the proceeding. In 1983, the Court of Appeal of the State of California, Fourth Appellate District, Division One reversed the superior court decision finding that the California Civil Code section 4600 dual standard of best interests and detriment applied to these proceedings. Appellee then petitioned for hearing in the California Supreme Court, which was granted and on October 22, 1984, the California Supreme Court issued its split decision (*In re Baby Girl M., supra,* 37 Cal.3d 65) in which the majority concluded that California Civil Code section 4600 is applicable to California Civil Code section 7017 proceedings and remanded the matter to the trial court for further proceedings consistent with the opinion—specifically for the trial court to consider the issue of detriment. The California Supreme Court in its decision specifically indicated that a finding of detriment could be sustained without a finding of parental unfitness. (*In re Baby Girl M., supra,* 37 Cal.3d 65, 75-76.) Although this apparently is the issue now raised by appellant on appeal before this Court, appellant did not seek review of this decision by this Court.

Pursuant to the remand by the California Supreme Court, a trial was held in February 1985, at the conclusion of which the court made both the detriment and best interests findings. The trial court specifically found that Katie

would suffer extreme emotional and psychological harm should she be removed from her adoptive home and that this harm constitutes detriment under California Civil Code section 4600. Appellant filed an appeal from that judgment and approximately two years later on April 30, 1987, the California Court of Appeal issued a split decision affirming the trial court. (App. pp. 1a-43a.) The majority decision concluded that the California Supreme Court had already determined that a finding of detriment can be sustained without a showing of parental unfitness and under the controlling legal standard it is proper to make a finding that the minor would suffer extreme detriment if removed from the home she had been in since 1981 (a period of almost six years by the time of this decision). Appellant filed a Petition for Review in the California Supreme Court which was denied on July 30, 1987, and the California Supreme Court ordered the case not to be published in the Official Appellate Reports. This appeal was filed on October 28, 1987. Appellant has filed this appeal with a motion for leave to proceed in forma pauperis although appellant lists his gross annual income as $36,000 in his affidavit filed in this Court on November 10, 1987.

The California Legislature has since amended California Civil Code section 7017, subdivision (d)(2), effective January 1, 1987 to specify that Civil Code section 4600 (the dual standards of best interests and detriment) is not applicable to such proceedings. These amendments were not held to apply to the case herein which was decided under the former California law, which law is no longer in effect (App. pp. 15a-15a-2).

Since the case is final in the California courts, the minor has now been adopted by the family with whom she

has been since August 1981. This case has been in the courts, and Katie in her adoptive home, for more than six years.

SUMMARY OF ARGUMENT

Appellee submits the appeal herein should be dismissed in that the questions and arguments presented in appellant's jurisdictional statement substantially misstate the holdings of the California courts in this matter. Further, the federal question apparently now sought to be reviewed by appellant was not timely or properly raised below or expressly passed on. Finally, any federal question raised in the appeal is so manifestly unsubstantial, based both on the holdings in the California cases below and the subsequent change of the law in California, that the appeal should be dismissed.

ARGUMENT

I. THE QUESTIONS PRESENTED AND SUPPORTING ARGUMENT OF APPELLANT IN HIS JURISDICTIONAL STATEMENT SUBSTANTIALLY MISSTATE THE HOLDINGS OF THE CALIFORNIA COURTS BELOW

Appellant states the question in his jurisdictional statement at page i whether it is a denial of equal protection to terminate the parental rights of an unwed father "... solely because it is in the best interests of the child?" and

argues in support of his appeal that the California Supreme Court had previously ruled in the case and the court of appeal declined to reconsider " . . . that California's custody tests of 'best interests' of the child controlled paternity suit claims by father's [sic] seeking to retain their parental rights." (p. 1.) Appellant then states that the test is that a parent is entitled to custody unless custody with the parent would be detrimental to the child but he continues to argue that the California courts applied solely the "best interests test" in this case. These argument substantially misstate the holdings of the California courts in this case and are seriously misleading as to those opinions and as to what federal issues can now properly be raised on this appeal.

In fact, the very question before the California Supreme Court in 1984 was the question of whether the parental rights of an alleged natural father might be terminated solely on a best interests finding or whether a court must also make a finding as to detriment pursuant to California Civil Code section 4600. In the 1981 trial, the court had applied only a best interests test. The California Supreme Court in *In re Baby Girl M., supra,* 37 Cal.3d 65 ruled that this was incorrect and that the proper standard in a California Civil Code section 7017, subdivision (d) proceeding to terminate a natural father's parental rights required not only a best interests finding but *also* a finding that it would be detrimental to the child to award the father custody. Thus, the California Supreme Court rejected a

test based solely on best interests and remanded the case for further proceedings as to the finding of detriment.[3] Therefore, it is grossly incorrect and misleading for appellant to now state that the California test that was applied to him was a "best interests test".

Although the arguments raised in appellant's jurisdictional statement are confusing it would appear that the only possible issue that could be raised by appellant in this appeal is as to the legal standard of detriment established by the California Supreme Court in this case in 1984 and pursuant to which the California Court of Appeal rendered its decision from which this appeal follows. Therefore, the rest of appellee's arguments herein will address whether an appeal should be granted on this issue of the legal standard of detriment applied to appellant rather than the questions raised of whether appellant's rights were terminated solely under a best interests test since clearly they were not and therefore that issue does not present any question, federal or not, for this Court to review.

II. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED IS NOT TIMELY OR PROPERLY RAISED AT THIS TIME

Since as set forth in section I above the question of termination of an alleged natural father's rights solely on the basis of "best interests" is not a proper question, then the remaining question raised by appellant is whether it is

---

[3]As set forth above, the California Legislature has since amended California Civil Code section 7017, subdivision (d) as to the standards to be applied but these amendments were not applicable to appellant, and therefore cannot be considered by this Court on this appeal.

a denial of equal protection to terminate the parental rights of an unwed father without a finding adverse to his parenting ability (Appellant's Question II). This question was neither timely raised and presented below nor is it timely raised and presented now. In effect, what appellant is really seeking to do is to have this Court review the 1984 decision of the California Supreme Court but such review would not be proper.

In *In re Baby Girl M., supra,* 37 Cal.3d 65, the California Supreme Court determined that it was necessary to make a detriment finding in the case and specifically remanded the case for application of the detriment standard based on later developing facts (37 Cal.3d at pp. 75-76). The majority opinion of the California Court of Appeal decision from which this appeal follows concluded that the California Supreme Court decision in this case (as well as its later decision in *Michael U. v. Jamie B.,* 39 Cal.3d 787 (1985)) had already resolved the standard for a finding of "detriment" which did not require a finding of parental unfitness (App. pp. 7a-15a). Therefore, the California Court of Appeal ruled that under the standard established by the California Supreme Court, detriment was established in this case by the severe psychological harm Katie would suffer if removed from the only parents she had known for six years (App. pp. 7a-15a).

Thus, what appellant is really seeking to do on this appeal is to challenge the decision of the California Supreme Court in 1984. This is not proper for several reasons. First of all, appellant has failed to show that he raised this particular issue before the California Supreme Court on the initial appeal. Although the California Court of Appeal, in the opinion from which this appeal is

taken, addressed constitutional issues, it correctly rejected consideration of the issue of whether a finding of detriment can be sustained without a finding of parental unfitness based on the prior Supreme Court decision in this case and *Michael U.* (App. p. 8a). Appellant contends at page 6 that the issue of terminating parental rights based solely on the best interests of the child has been raised and reserved by this Court. However, as set forth in paragragh I herein, that is not the issue before this Court in this case as that is not what the California courts found to be the standard to be applied to appellant.

Appellant states at pages 1-2 that "no appeal was filed previously because the judgment terminating parental rights was not final; it was subject to the unwed father, appellant, proving he was the best person to have custody so he could retain his rights." Not only does this statement misstate the holding of the courts below, but appellant is incorrect that he could not have filed this appeal from the 1984 California Supreme Court decision. Although 28 United States Code section 1257 requires an appeal to be filed from a "federal judgment or decree rendered by the highest court of a state", appellee submits that an appeal could have been filed from the 1984 California Supreme Court decision in this matter as it was final on the issues now raised. (*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156 (1973).)

Moreover, it is extremely prejudicial and inequitable to seek review now, three years later, in a case concerning a minor who has been with her adoptive family for a period in excess of six years now. Because of appellant's failure to timely and properly file this appeal from the California

Supreme Court decision, this case which has now been in the judicial system more than six years is still pending to the prejudice of all involved.

III. EVEN IF THE FEDERAL QUESTION HAS BEEN TIMELY AND PROPERLY PRESENTED BY APPELLANT, NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THIS CAUSE

As set forth above, the only issue of law properly raised by appellant is whether it is a denial of equal protection to terminate the parental rights of an unwed father without a finding of parental unfitness and this issue as raised in this case presents no substantial federal question for consideration by this Court. Appellant asserts that parenting is a fundamental right and that this case raises substantial issues. However, these conclusionary statements are made without any argument or analysis other than citing several cases of this court as to parental rights of fathers.

In California the law provides for two categories of fathers: so-called "presumed natural fathers" and "alleged natural fathers" and provides for different rights for each category. Appellant is classified as an "alleged natural father". A presumed natural father is defined by Civil Code section 7004, subdivision (a) (App. p. 82a). Basically, he is one who was married to (or attempted to marry) the mother at the time of the birth or conception or has received the child into his home and openly held out the child as his natural child. Presumed natural fathers have rights basically equal to that of mothers as to custody, consent to adoption and as to involuntary termination of parental rights. (Civ. Code § 232 et seq.) A bio-

logical father who does not qualify as a presumed natural father does not have these same rights but has more limited rights.

Under the California statutes, an alleged natural father must be given notice, consistent with due process requirements, of a proceeding to terminate his parental rights, before a minor may be adopted. The court then proceeds to determine parentage and custodial rights. (Civ. Code § 7017, sub. (d); App. p. 84a.) The California courts have upheld these statutory distinctions between presumed and alleged natural fathers. Further, in *In re Baby Girl M., supra,* 37 Cal.3d 65, the California Supreme Court concluded that under the then applicable state statutory scheme a court must also find that it would be detrimental to the child to award custody to the alleged natural father. Detriment was defined as not to require a finding of parental unfitness and that standard was applied to appellant in terminating his rights on remand.

Generally, state law governs parent-child relationships, although in some cases this Court has held that the federal Constitution supersedes state law and provides even greater protection for certain formal family relationships and in a few cases this Court has considered the extent to which the Constitution affords protection to the relationship between natural parents and children born out of wedlock. (*Lehr v. Robertson,* 463 U.S. 248, 257-259 (1983).) In addition to *Lehr,* this Court has considered the extent to which a natural father's biological relationship with his child received protection under the due process clause in *Stanley v. Illinois,* 405 U.S. 645 (1972), *Quilloin v. Walcott,* 434 U.S. 246 (1978) and *Caban v. Mohammed,* 441 U.S. 380 (1979).

Stanley v. State of Illinois, supra, 405 U.S. 654 concerned a biological father who, although not married to the mother, had lived with her and the children intermittently for eighteen years and held the children out as his own and this Court held that, after the mother died, the state could not take the children without notice and a hearing on his fitness. In California, this father would be classified as a presumed natural father with the rights thereof. *Caban v. Mohammad, supra,* 441 U.S. 380 again concerned a biological father who, although not married to the mother, lived with her for five years as husband and wife, during which time two children were born. As an unwed father, New York State law did not provide him with a veto to an adoption and this Court found this state law unconstitutional. Again, California would classify Caban as a presumed natural father.

In *Quilloin v. Walcott, supra,* 434 U.S. 246, this Court considered a biological father who had never married the mother or lived with the twelve-year old minor whom a stepfather was seeking to adopt. The Georgia state statute denied him any veto power over the adoption. The Court upheld the statute as to a claim of equal protection. The Court found the "best interests of the child" standard was adequate as to this category of father and family without the necessity of a showing of his "unfitness." Also, in *Parham v. Hughes,* 441 U.S. 347 (1979) this Court upheld a Georgia statute as to an equal protection challenge which precluded the father of an illegitimate child from suing for the wrongful death of his child.

Therefore, it can be concluded that while constitutional guarantees may provide certain rights to biological

fathers (such as notice and hearing), the individual situations must be carefully scrutinized to determine exactly what rights are to be accorded, and there is no denial of equal protection to have terminated appellant's rights without a finding of unfitness but based on the detriment established by the severe harm the child would suffer if removed from her adoptive home.

The issues and facts in this case present no substantial question for this Court to again consider the rights of unwed, biological fathers. In *In re Baby Girl M., supra,* 37 Cal.3d 65, 74, the court noted that this Court had not directly considered a fact situation similar to the case herein where a mother has relinquished a newborn child and refused the father any contact and that this Court had not addressed whether the natural father's parental rights might be terminated by only a best interests standard or if a further finding of detriment was required.

However, in *Lehr v. Robertson, supra,* 463 U.S. 248, this Court found constitutional a registry statutory scheme, under which an unwed father was required to file a notice in a registry in order to be entitled to notice of an adoption proceeding. Under that scheme, appellant herein would probably have had no opportunity to be heard or if heard, apparently only a best interests standard would have applied. This Court found that the "mere existence of a biological link" does not mean constitutional protection equivalent to a mother or a father of a developed parent-child relationship, but merely the opportunity to develop a relationship. The biological father in *Lehr* had made substantial efforts to establish a relationship with the child but was prevented by the mother, yet this Court

upheld the statutory scheme which terminated his rights. Appellee submits that under this Court's analysis in *Lehr*, and the preceeding cases as to unwed fathers, appellant herein has not been denied any constitutional right or opportunity and has not been denied any equal protection such that a substantial federal question is presented. Neither the statutory scheme nor the standard of detriment used in the California courts in this case have violated any constitutional rights of appellant.

If however, it is conceded for purposes of argument that a man has a constitutional right to a child with whom he has no relationship, which arises solely from a casual, unintentional insemination of a woman with whom he basically has no further relationship, appellee submits that the nature of any such constitutional right is minimal and must be balanced against the interests (constitutional and otherwise) of the others involved in this matter, and most importantly, of the child. The paramount interest, as expressed in the California laws and decisions, as well as the opinions of this Court, is the welfare of the child. (*Lehr v. Robertson, supra,* 463 U.S. 248, 258.) Any constitutional rights granted to unwed fathers by this Court's prior decisions do not give such a father the right to be awarded custody if the child will be harmed. Balanced against what is basically a property claim of the biological father in these circumstances are the constitutional rights of the child. This Court has recognized that a child is not beyond the protection of the Constitution (*Bellotti v. Baird,* 443 U.S. 662 (1979)) and the harm and detriment to the child's rights, who has been in her adoptive home for more than six years, must tilt the balance in favor of denying appellant custody. Thus, appellant's reliance on the prior

cases of this Court is misplaced in showing either a deprivation of equal protection or that the facts and issues of this case present an important question of federal law.

Finally, it is important in determining whether this case presents a substantial federal issue to look at both the uniqueness of the facts and issues in this case and the statutory changes in the California law which are now applicable although they were not applied retroactively to appellant but which effectively render moot the issue as to the legal standard of detriment to terminate the rights of alleged natural fathers. Although this case, and the six years it has already been in litigation, have clearly had a profound impact on the lives of the parties to this particular case, because of statutory and case law changes and the unique facts of this lengthy litigation, this case raises no substantial federal issue. Although appellant's jurisdictional statement attempts to raise emotional issues, appellant has failed to show that the courts' definition of detriment as not equalling unfitness, and as applied in this case, is of any substantial federal importance such that this Court should find that it has jurisdiction and continue these already too long protracted legal proceedings.

IV. CONCLUSION

For the foregoing reasons, appellee's motion to dismiss the appeal herein or in the alternative to affirm the judgment of the State of California Court of Appeal, Fourth Appellate District, Division One should be granted.

Respectfully submitted,

LLOYD M. HARMON, JR., County Counsel
County of San Diego

DANIEL J. WALLACE, Chief Deputy
Counsel of Record
ARLENE PRATER, Deputy
1600 Pacific Highway, Rm. 355
San Diego, CA 92101-2469
Telephone: (619) 531-4847
Attorneys for Appellee